SUPREME COURT, U.S.

FILED

IN THE

Supreme Court of the United States

October Term, 1966

No. 844

PAUL G. STEPHAN and JANE A. STEPHAN,
Appellants,

v.

STATE TAX COMMISSIONER OF THE STATE OF DELAWARE,
Appellee.

Appeal From the Supreme Court of Delaware

JURISDICTIONAL STATEMENT

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Pro se

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STATE TAX COMMISSIONER OF THE STATE OF DELAWARE
Appellee.

APPEAL FROM THE SUPREME COURT OF DELAWARE

JURISDICTIONAL STATEMENT.

The appellants, Paul G. Stephan and Jane A. Stephan, in support of the jurisdiction of the Supreme Court of the United States to review the above cause on appeal, respectfully submit:

REPORTS AND OPINIONS.

This appeal is taken from a ruling by the Supreme Court of the State of Delaware in above cause docketed as 47-1968, reported at 245 A. 2d 552, opinion appended hereto (A-1) (p. 1a) affirming the ruling of the Superior Court of New Castle County Docket No. 3010 Civil Action 1968, reported at 241 A. 2d 516, opinion appended hereto (A-2) (p. 9a) affirming the ruling of the State Tax Board Docket No. 341, unreported, ruling appended hereto (A-3) (p. 11a).

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

This matter is an appeal from the findings of the Supreme Court of the State of Delaware pursuant to Delaware Income Tax Law, Tit. 30, Vol. 12, *Delaware Code,* Ch. 11, insofar as it applies to nonresidents of Delaware, (pertinent portions appended hereto as (A-4) (p. 12a), in the question of constitutionality in relation to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution.

The decision of the Supreme Court of the State of Delaware (A-1) (p. 1a) sought to be reviewed was dated August 5, 1968, and a petition for re-argument having been filed by the appellant, an order denying the petition for re-argument was filed August 29, 1968. Notice of appeal was filed with the Supreme Court of the State of Delaware on November 8, 1968.

The statutory provision conferring jurisdiction on the Supreme Court of the United States to review the instant case is Title 28, USC, Sec. 1257(2).

CASES SUSTAINING THE JURISDICTION OF THIS COURT.

The nature and record of matter of this appeal conform to the requirements as set forth in Sec. 1257(2) in that the appellants do question the validity of a state statute on the ground of its being repugnant to the Constitution of the United States and in that the decision of the State Supreme Court is in favor of its validity. The question of whether this court has jurisdiction then resolves to whether the nature of the appeal is of sufficient importance and has sufficient merit to warrant consideration by this court. The appellant contends and intends to prove the importance and merit for such consideration in this statement. In addition,

three cases sustaining jurisdiction claims have been selected and are offered as follows:

In *Charleston Federal Savings & Loan Association v. Alderson* (West Virginia 1945) 65 S. Ct. 624, this court made it clear that although there was a definite requirement for constitutional question in order to invoke its jurisdiction, that, once that question was raised, this court has unquestioned jurisdiction. The statement upholding jurisdiction is noted as:

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court."

In *Horwitt v. Horwitt* (Conn., 1950) 90 F. Supp. 528, the jurisdiction of this court, in a matter of Constitutional question, was again upheld even though the Connecticut Supreme Court had held against the validity of the state statute. In its opinion, the court held that:

> "There is no question that the United States Supreme Court may review directly the decisions of the highest state courts on the constitutionality, under the Federal Constitution, of state statutes, or that the lower Federal courts may independently determine that state laws subvert rights protected by the United States Constitution, even though the state supreme court may have held that they do not."

Further in the same opinion, the court noted need for caution in rulings contrary to State Supreme Court opinions, but re-affirmed the right of this court to determine the Federal question and held:

> "We must approach cautiously any contention that the state court's constitutional interpretation is erroneous, however, for a disagreement with the state court means that two sets of rights exist, one for those whose cases are tried in one forum, another for those in the other forum, although both are based on the identical statute. We, nevertheless, have the power and duty of determining independently the Federal question involved,—whether the state statute, applied in accordance with the state court's interpretation of the meaning of its terms, violates the due-process clause of the Federal Constitution."

In *Warren Trading Post Company v. Arizona State Tax Commission* (Arizona 1965) 85 S. Ct. 1242, this court again upheld its right of jurisdiction in relation to a tax matter where the validity of the tax in relation to the Federal Constitution was raised and upheld. The statement of the court relative to jurisdiction is recorded as:

> "The case is properly here on appeal under 28 USC, Sec. 1257(2) (1958 ed.). Since we hold that this state tax cannot be imposed consistently with federal statutes applicable to the Indians on the Navajo Reservation, we find it unnecessary to consider whether the tax is also barred by that part of the Commerce Clause giving Congress power to regulate commerce with the Indian tribes."

In light of clear conformity, of the instant matter on appeal, to the requirements set forth in Sec. 1257; and the substantiation of the right of this court to exercise jurisdiction in such instance, it seems clear that there can be no question of the jurisdiction of this court if it should choose to hear the particulars and review the ruling of the Delaware Supreme Court.

DELAWARE STATUTES INVOLVED IN APPEAL.

The statutes containing the laws regarding income taxes in the State of Delaware are contained in Tit. 30, Vol. 12, *Delaware Code,* Part II, Ch. 11. Pertinent parts of that chapter as they apply to nonresidents are set forth separately in the appendix (A-4) (p. 12a).

Since the matter in question relates to the denial of privileges to nonresident taxpayers, additional statutes and rulings as applied to nonresidents are also appended for information as follows:

The statutes containing the laws regarding Free Public Schools are contained in Tit. 14, Vol. 8, *Delaware Code* Part I. Pertinent portions of that Part I as they apply to nonresidents are set forth separately in the appendix (A-5) (p. 15a).

The statutes containing the laws regarding the University of Delaware are contained in Tit. 14, Vol. 8, *Delaware Code* Part II. Pertinent portions of that Part II as they apply to nonresidents are set forth separately in the appendix (A-6) (p. 16a). Further, under powers conferred by State Legislature, the University of Delaware has set certain standards, fees and requirements related to nonresidents and these are set forth in Vol. 65, No. 6, *Bulletin of the University of Delaware,* pp. 52-56. Pertinent portions are set forth separately in the appendix (A-7) (p. 17a).

Still further, in the matter of the regulation of the University of Delaware, in the same *Bulletin of the University of Delaware,* p. 199, entrance to Associate Degree Programs is forbidden to the nonresident. Pertinent portions of this section are also set forth in the appendix (A-7) (p. 19a).

The statutes containing laws regarding Welfare are contained in Tit. 31, Vol. 12, *Delaware Code.* Pertinent portions of that Title are set forth separately in the appendix (A-8) (p. 21a).

QUESTION PRESENTED BY THIS APPEAL.

The question presented by this appeal is whether the appellants, as nonresident taxpayers in the State of Delaware, have been treated in a discriminatory fashion in comparison with resident taxpayers with the result that taxes extracted from nonresidents are in violation of Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution by the Ruling of the Supreme Court of the State of Delaware upholding the Tax Board's Ruling denying the right of the appellant to make an adjustment in tax due in relation to eligibility for benefits provided by the State.

STATEMENT OF FACTS.

This proceeding originated when the appellants, having experienced treatment by the State of Delaware which the appellants considered to be discriminatory (unequal protection), filed their 1966 Delaware State Income Tax Return with a correction factor to compensate for the alleged discrimination. The Tax Commissioner denied the right of the appellants to apply the correction factor and the appellants appealed the matter to the State Tax Board.

In the appeal to the Tax Board, the appellants charged that the Delaware Tax laws resulted in discrimination and contained inequities. In its response, the Tax Board stated that it does not have the right to rule on constitutional matters and could only interpret the law and apply it to the tax and therefore entered its Order on January 18, 1968 denying the petition and affirming the Tax Commissioner's assessment (A-3) (p. 11a).

The matter was then appealed to Superior Court requesting a ruling on the constitutionality of the Delaware Tax Laws regarding nonresidents. The Superior Court found that no discrimination was shown and that there was no violation of Constitutional provisions. The ruling of the State Tax Commissioner was affirmed. A copy of the Superior Court Ruling is appended (A-2) (p. 9a).

In the prescribed succession of appeals, the appellants then appealed to the Supreme Court of the State of Delaware. The court affirmed the judgment below and subsequently denied a petition for re-argument. A copy of the ruling is appended (A-1) (p. 1a).

MANNER IN WHICH CONSTITUTIONAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED.

The issue on this appeal was first raised in the Petition to the Delaware Tax Board as a question of discrimination,

thereby inferring Constitutional Question, as set forth in the transcript of the Tax Board Record, p. 1, Par. 5a, in which the appellant stated:

> "Pennsylvania residents employed in the State of Delaware are discriminated against in that the State of Delaware does not permit participation of said taxpayers in benefits to be derived from those taxes in those several categories set forth in the formula applied to the return in question."

Further evidence of Constitutional Question was entered in an exchange between the Chairman (of the Tax Board) and the appellant recorded in the transcript of the proceedings on pp. 18 and 19 as follows:

> "The Chairman: Your argument falls, I believe, into a constitutional attack on the validity of the law.
>
> Mr. Stephan: I think that's right.
>
> The Chairman: Because of the alleged discrimination and inequities in it. This board is an administrative body of a quasi judicial nature. That means it is primarily administrative, but it has half legal duties.
>
> Mr. Stephan: Yes, sir.
>
> The Chairman: As such, we must apply the law as it is written. As to an attack on its constitutionality, which I think may have some basis, something similar has been raised before in this board, not in the detail that you have raised it. I think that we don't have the right to go into the Constitution. We must just interpret the law and apply it to the tax."

Again, in the question presented to the Superior Court on appeal, the appellants claimed a question of constitutionality of the Delaware Tax Laws in their letter of February 19, 1968 considered and accepted as their brief, stating:

"Question

The question involved here is basically one of constitutionality of Delaware Tax Laws regarding nonresidents."

Finally, in the appeal to the Supreme Court of the State of Delaware, the court in its Opinion (A-1) (p. 3a), stated:

"The appellants do not question the power of the state to tax nonresidents under the Income Tax Law; they contest only the 'degree of taxation' imposed, asserting unfair and unreasonable discrimination against nonresidents. The appellants contend that the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution require a direct relationship between the tax imposed and the benefits derived."

It is evident that the Constitutional Question was raised and that the ruling of the Supreme Court of Delaware was in full understanding that this was the basis for the matter in question.

GROUNDS CONTENDING FEDERAL QUESTIONS ARE SUBSTANTIAL.

Throughout the progress of the matter in question through the Delaware legal channels, it has been evident that there is recognition of an unjust situation regarding nonresident taxpayers. The State Tax Board recognized it when it said (in addressing the appellant at the close of the hearing):

"Your arguments, I think, would have weight on the constitutionality of our law as applied in the field of possible discrimination against nonresidents." (State Tax Board Hearing Transcript, p. 23)

The State Deputy Attorney General recognized the inequity when he said in his "Answer" Brief filed in the Supreme Court of Delaware, p. 6, 1st par.

> "The petitioner has presented a series of arguments that may have some merit."

The Delaware Supreme Court recognized it in their Opinion, appended hereto as (A-1) (p. 8a), when they said:

> "It may be said that the appellants' position in this case appeals to one's sense of fairness, especially because the appellants are called upon to pay a full measure of taxes in the state of their residence upon the same income."

Such injustices were the very core of motive for instigation of our American Revolution and provided later incentive for adoption of Section 1 of the Fourteenth Amendment to the Constitution. Full examination of the discriminatory situation created by Delaware State Legislature discloses that the injustice, so recognized and acknowledged, is indeed a serious breech of this amendment.

In exercising its sovereign right to tax the earnings of an individual residing outside its borders, the State must assume obligation to make certain that the balance of its laws do not discriminate against that same individual. This principle is set forth in *State of Wisconsin v. J. C. Penney Co.* (1941), 311 U. S. 435, 61 S. Ct. 246, 249-250 which is quoted in the Ruling of the Supreme Court of the State of Delaware (A-1) (p. 7a). Considerable evidence exists to demonstrate that this requirement is not met. Reference to this evidence follows.

Delaware elects to support its Free Public School System to a large degree from State funds; as a result, Public Education is, by far, the largest single category in the

State's Annual Budget. This, then, is an important category for evaluation as to provision for inclusion of the nonresident taxpayer in the benefits resulting from the expenditure. However, by the exclusion of provision for the enrollment of out-of-state students in the Delaware schools, the State Legislature has been able to very effectively avoid the expense of providing facilities and services for the nonresident taxpayer's children. The absence of any such provision is most evident in those portions of Title 14, Vol. 8, *Delaware Code,* Part I which are set forth as appendix (A-5) (p. 15a). While considerable effort has been made to permit transfer among Districts, it is evident that the definition of those Districts does not include those across state lines inasmuch as methods of taxation and payment are set forth which could not be extended across the borders of any state. The nonresident taxpayer is thereby very effectively cut off from this benefit.

In the matter of Higher Education, it is a desirable thing for the state to accept nonresident students into their institutions. It is accepted practice for any state to have two levels of tuition costs with the lower rate for residents justified by the fact that the learning institution is supported by state taxes. This justification certainly should include the nonresident taxpayer who pays taxes equal to those of a resident. Delaware, however, has chosen to arbitrarily classify the nonresident taxpayer with all nonresidents and charges them nonresident tuition rates. This policy and ruling is clearly set forth in the *Bulletin of the University of Delaware,* Vol. 65, No. 6, pp. 52-55, pertinent parts appended hereto (A-7) (p. 17a). The University again discriminates when it excludes the nonresident, without recognition of tax contributions, from participation in certain Associate Degree programs. These limitations are also set forth in the *Bulletin of the University of Delaware,* Vol. 65, No. 6, p. 199, as appended hereto (A-7) (p. 19a).

Continuing in the area of Higher Education, State Legislature has further discriminated against the nonresident taxpayer by excluding him from eligibility for State Grants or Scholarships. These exclusions are set forth in Title 14, Vol. 8, *Delaware Code,* Part II, pertinent parts of which are set forth in appendix (A-6) (p. 16a).

The Delaware Welfare Laws continue the vein of discrimination against the nonresident taxpayer. The requirements for various benefits include residency and are without recognition of the nonresident taxpayers' contributions. These laws are established in Title 31, Vol. 12, *Delaware Code.* Pertinent portions containing reference to residency requirements are set forth in appendix (A-8) (p. 21a).

CRITIQUE OF RULING APPEALED.

In the Delaware Supreme Court Ruling (A-1) (p. 6a), the court compared the requested balance of benefits to possible resident claims for similar relief based on various possible circumstances. What is missed by that Ruling is that the possibilities offered were by *circumstance* whereas the actualities in the complaint of the appellants is by *statute.* This is an important difference and is the one which establishes lack of Equal Protection and results in taxation without Due Process. The court did not recognize that denial of benefits to nonresidents by statutes becomes discrimination when a portion of such nonresidents become "Taxables" and are classed equal to residents by Title 30 as to degree of taxation. It is Title 30 which then causes the discriminatory situation of which the apellants complain.

Diligent search for cases to provide direct citation bearing on income taxes applied to the individual's earnings in a foreign State and requirement for equal status to benefits to the resident of that State were fruitless. The

Delaware Supreme Court queried both the appellant and the appellee on this question and both reported that none was found. Citations used by the appellants illustrated the principle of the requirement of relation of taxes to benefits whereas the State has relied primarily on citations which prove its right to tax.

In their ruling and opinion, the Supreme Court of Delaware stated "any change of the law to relieve nonresidents of unfairness must come from the General Assembly." While this seems a reasonable statement, in the absence of a ruling proclaiming the existing situation to be unconstitutional, or to provide guidelines which would be considered fair and equitable, the General Assembly has little incentive to provide fair treatment for the nonresident taxpayer. In fact, the recent attitude of State Legislature has been in a direction to extract additional monies from the nonresident by enacting additional provisions to reduce allowances for nonresidents. Two such changes are evidenced in Title 30, *Delaware Code,* as follows:

The "Nonresident Apportionment Ratio," Title 30, Vol. 12, *Delaware Code,* Part II, Chap. 11, Subch. I, Sec. 1101, Par. 7b, as appended hereto (A-4) (p. 13a), is applied to reduce the Personal Exemptions and Credits for Dependents as set forth in Sec. 1117 of the same reference (A-4) (p. 13a). While this ratio, in itself, may be considered a reasonable approach to equalize tax rates between residents and nonresidents, when viewed against the already exorbitant rate for nonresidents, it can only be construed as a means to increase the "take" from those who have no direct recourse against the legislators.

A second change designed to increase the nonresident taxation is evident in the same reference under Sec. 1163 appended hereto as (A-4) (p. 14a) wherein the married nonresident taxpayer, whose spouse has any income not

reportable within the State, is prohibited from filing a joint return in order to enjoy such resulting lower tax rates. Here, again, this can only be construed as "take" from the unrepresented subjects of the authority of State Legislature.

All of the above are offered as reason and evidence that the injustices and discriminations constitute Federal Questions so substantial as to require consideration by this court.

SUMMARY.

The foregoing reasons and evidence that the injustices and discriminations claimed constitute Federal Question so substantial as to require consideration by this court are summarized as:

1. Constitutional Question of State Statute was properly and timely raised and was ruled against by the highest court in the State.

2. No precedent has been shown to provide basis for the unfavorable ruling.

3. Reasons given by the Delaware Supreme Court for its ruling are erroneous in that they ignore the relationship of one State Statute to another and, in their reasoning, rely on a comparison of hypothetical claims for relief based on denial of benefits by circumstance to real claims for relief based on denial of benefits by statute.

CONCLUSION.

It is not enough for the Supreme Court of Delaware to say that the Tax Laws of the State are unjust but that they fall within Constitutional Limits. It must be recognized that even though the State may lose substantial income, the rights of the citizen to Equal Protection and Due Process must be explored to the fullest extent and therefore the question must be submitted to the Supreme Court of the United States.

The appellants respectfully submit that this Most Honorable Court has jurisdiction of this appeal, and that, if this appeal should be considered as improvidently taken, begs the Court consider it as a petition for writ of certiorari for the reasons stated and prays that this Court will grant a hearing.

.....

PAUL G. STEPHAN, *pro se*

Service of required copies of this Jurisdictional Statement is hereby acknowledged.

.....

Edward J. Wilson, Esq. for
State Tax Commissioner of the
State of Delaware

Received this ..... day of
December, 1968

APPENDIX A-1.

IN THE

SUPREME COURT OF THE STATE OF DELAWARE.

No. 47, 1968.

PAUL G. STEPHAN AND
JANE A. STEPHAN,
Petitioners,
Appellants,

v.

STATE TAX COMMISSIONER,
Respondent,
Appellee.

(August 5, 1968.)

WOLCOTT, *Chief Justice;* CAREY and HERRMANN, *JJ.*, sitting.

Upon appeal from the Superior Court. Affirmed.

Paul G. Stephan and Jane A. Stephan, pro se.

Edward J. Wilson, Deputy Attorney General, Wilmington, for respondent, appellee.

HERRMANN, *Justice:*

Upon this appeal, we are required to rule on the constitutionality of the Delaware Income Tax Law * (30 *Del. C.* Ch. 11) insofar as it applies to non-residents of Delaware.

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* A "taxable" is defined in the Delaware Income Tax Law (30 *Del. C.* § 1101) as follows:

"'Taxable' means—

"(1) a natural person, including a minor, with a gross income of $600 or more, who is a resident of the State of Delaware or who has been a resident of the State at any time during the income year;

"(2) each spouse, in the case of a married couple living together with a combined gross income of $1,200 or more;

"(3) a guardian of a resident of Delaware;

"(4) an executor or administrator of a deceased resident of Delaware;

"(5) a trustee, if but only to the extent that, the net income of the trust for the income year (i) is distributed or irrevocably set aside for future distribution in whole or in part to a person who at any time during such income year was a resident of Delaware, and/or (ii) may be distributed in whole or in part to the creator of the trust upon the happening of some event or the exercise of any power which he reserved thereunder if at the time of creation of the trust and at any time during such income year he was a resident of Delaware;

"(6) any officer or employee of the State of Deleware or any political subdivision of Delaware;

"(7) every natural person who is a nonresident of this State but only to the extent that such person received income during the taxable year:

"(a) as compensation, as an employee in the conduct of the business of an employer, for personal services:

"(i) rendered in this State, or

"(ii) attributable to employment in this State and not required to be performed elsewhere, or

"(b) to the extent that such person derived net profits from a profession, vocation, business, trade or commerce conducted in this State."

The rates of tax, exemptions, credits, and deductions are substantially the same for residents and non-residents. See 30 *Del. C.* §§ 1111-1119.

The appellants, Mr. and Mrs. Paul G. Stephan, reside in Pennsylvania. Mr. Stephan is employed in Delaware and he commutes to and from his home. In filing their 1966 Delaware Income Tax Return, the appellants sought to reduce the tax to 25.2% of the amount that would be otherwise due, stating that this was being done to eliminate taxation for those State-provided services concerning which, as non-residents, they were "ineligible to receive benefits under any circumstances." The figures used by the appellants, in arriving at the factor of reduction, were based upon the 1966 report of the State Budget Director to the General Assembly. Five general categories were listed by the appellants as State benefits which they, as non-residents, could not receive: health and welfare, debt service, grants-in-aid, higher education, and public education. The appellants claimed that their taxes should be reduced in proportion to their ineligibility for such benefits and the relationship of State expenditures for such items to total State expenditures; that any other application of the State Income Tax Law renders it unconstitutional as to them.

The State Tax Commissioner denied the requested adjustment and declined to refund a portion of the taxes withheld, as requested by the appellants. The matter was reviewed by the State Tax Board which upheld the Commissioner's ruling. The taxpayers appealed to the Superior Court which also affirmed the Commissioner. See 241 A. (2d) 516. This appeal followed.

The appellants do not question the power of the State to tax non-residents under the Income Tax Law; they contest only the "degree of taxation" imposed, asserting unfair and unreasonable discrimination against non-residents. The appellants contend that the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the

Federal Constitution require a direct relationship between the tax imposed and the benefits derived. They contend that "taxes, in order to provide equality and avoid the stigma of a scheme calculated to induce inequality, must take into consideration the purposes and goals to be achieved by the use of the monies collected and not attempt to extract unfair proportions from any other class of a taxpaying group.":

The appellants' position is without legal support. We are satisfied that, under well-established fundamental principles, the Delaware Income Tax Law complies with the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment.

That the State of Delaware has jurisdiction to impose a tax upon the income of non-residents arising from any business, trade, profession, or occupation carried on within its borders, and that such tax does not violate the due process of law provision of the Fourteenth Amendment, was settled by the United States Supreme Court in *Shaffer v. Carter, State Auditor,* 252 U. S. 37, 40 S. Ct. 221 (1920). Referring to the contention that a non-resident, although conducting a business or carrying on an occupation in a state, cannot be required through income taxation to contribute to its governmental expenses, the Court there stated:

> "* * * In our system of government the states have general dominion, and, saving as restricted by particular provisions of the federal Constitution, complete dominion over all persons, property, and business transaction within their borders; they assume and perform the duty of preserving and protecting all such persons, property, and business, and, in consequence have the power normally pertaining to governments to resort to all reasonable forms of taxation in order to

defray the governmental expenses. Certainly they are not restricted to property taxation, nor to any particular form of excises. In well-ordered society property has value chiefly for what it is capable of producing, and the activities of mankind are devoted largely to making recurrent gains from the use and development of property, from tillage, mining, manufacture, from the employment of human skill and labor, or from a combination of some of these; gains capable of being devoted to their own support, and the surplus accumulated as an increase of capital. That the state, from whose laws property and business and industry derive the protection and security without which production and gainful occupation would be impossible, is debarred from exacting a share of those gains in the form of income taxes for the support of the government, is a proposition so wholly inconsistent with fundamental principles as to be refuted by its mere statement. That it may tax the land but not the crop, the tree but not the fruit, the mine or well but not the product, the business but not the profit derived from it, is wholly inadmissible.

* * *

"And we deem it clear, upon principle as well as authority, that just as a state may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to nonresidents from their property or business within the state, or their occupations carried on therein, enforcing payment, so far as it can, by the exercise of a just control over persons and property within its borders. * * *."

And it has been held that there is no denial of due process in a taxing statute unless it is "so arbitrary as to compel the conclusion that it does not involve exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power." *Magnano v. Hamilton,* 292 U. S. 40, 44, 54 S. Ct. 599 (1934). The Delaware Law clearly meets such tests of due process.

As to the claim of violation of the equal protection of the law guaranty, it cannot be said that the Statute discriminates against non-residents, either as to the measure or the enforcement of the tax. The test of equal protection of the laws is met if there is no capricious or arbitrary classification as between taxables, there being no "iron rule of equality" imposed by the Equal Protection Clause. *Allied Stores of Ohio, Inc. v. Bowers, Tax Commissioner,* 358 U. S. 522, 79 S. Ct. 437 (1959). The Delaware Law unquestionably meets that test. The Statute makes no substantial distinction between residents and non-residents, or among non-residents. If residents and non-residents are treated alike by a taxing statute, there can be no denial of equal protection; yet, it is this like treatment of which appellants actually complain.

Indeed, the appellants do not claim an arbitrary or unreasonable classification such as is usually encountered in cases in which the Equal Protection Clause is invoked. Their claim of discrimination is based solely upon the limitation of the benefits they are able to derive from the tax under the circumstances. Tax liability may not be thus apportioned according to benefits derived; such concept is wholly inconsistent with our system of taxation. If it were otherwise, residents as well as non-residents could claim innumerable tax exemptions that would wreck the system: childless citizens could claim the right to be excused from the payment of taxes for school purposes, bed-ridden in-

valids from taxes for roads, affluent citizens from taxes for welfare, healthy citizens from taxes for health protection, and newcomers to the State from taxes for old debt service. The examples are limited only by the imagination.

The Fourteenth Amendment does not require any such measure of tax liability by benefits derived. As precedent, the appellants rely upon the following language in *State of Wisconsin v. J. C. Penney Co.*,* 311 U. S. 435, 61 S. Ct. 246, 249-250 (1941):

> "* * * A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.
>
> "* * * That test [of constitutionality] is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. * * *."

The general principles there expressed are unquestionable; but in their application, they cannot mean that the Fourteenth Amendment requires such individual tailoring of tax bill to benefits derived as is being sought by the appellants.

The concept urged by the appellants is foreign to the Federal Income Tax system which has withstood many constitutional attacks. E.g., *Brushaber v. Union P. R. Co.*,

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* It is noteworthy that this case has been interpreted as extending state taxing authority to its "furthest extreme [by] removing judicial restraints on state taxing power." See 2 *Wash. & Lee L. Rev.* 311 (1941); 18 *N. Y. U. L. Rev.* 590.

240 U. S. 1, 36 S. Ct. 236, 245 (1915). It is equally inconsistent with the Delaware Income Tax System.

It may be said that the appellants' position in this case appeals to one's sense of fairness, especially because the appellants are called upon to pay a full measure of taxes in the State of their residence upon the same income. It must be remembered, however, that the issue before us is the constitutionality of the tax measure—not its fairness; and the two are not necessarily coincident. Revenue laws are notoriously not expressions of an ordered system of reason and fairness. There probably has never been a revenue statute which, by design or oversight, has not favored some group and laid the basis for a claim of unfairness to others. *Lewyt Corp. v. Comm'r of Int. Rev.*, 349 U. S. 237, 249, 75 S. Ct. 736 (1955). Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition sought to be remedied thereby. *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 521-522, 57 S. Ct. 868 (1937).

Our conclusions, therefore, are as follows: It is no constitutional defense to the Delaware Income Tax Law that the taxpayer is not directly benefited thereby, or is less benefited than others who pay the same tax. Compare *Greenough v. Tax Assessors*, 331 U. S. 486, 67 S. Ct. 1400 (1947). And any change of the Law to relieve non-residents of unfairness must come from the General Assembly.*

The judgment below is affirmed.

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* There have been various suggestions as to legislative remedies for any unfairness arising from duplication of income taxation by the states. For example, it has been suggested that the state of residence and the state of origin tax income on an equal basis. See Fisher, *Toward a Theory of Personal Income Tax Jurisdiction*, 33 Taxes 373 (1955). The solution adopted by many states is the allowance of a credit to resident taxpayers for income taxes paid to another state. This has been termed the "most effective device" against multi-state income taxation. See Soriano, *Multi-State Taxation*, 111 *Univ. of Penn L. Rev.*, 974, 993 (1963).

APPENDIX A-2.

IN THE

SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CA 3010, 1968

PAUL G. STEPHAN AND JANE A. STEPHAN,
Petitioners, Appellants,

v.

STATE TAX COMMISSIONER,
Respondent, Appellee.

OPINION

Paul G. Stephan and Jane A. Stephan, pro se.

Edward J. Wilson, Esquire of Wilmington for the Respondent, Appellee.

(April 23, 1968)

WRIGHT, *J.*

This is an appeal from a ruling of the State Tax Commissioner.

The appellants, who are husband and wife, are residents of the State of Pennsylvania. The husband is employed in Delaware.

Under certain of the provisions of Title 30 of the Delaware Code the appellants are required to pay a tax on that portion of their income earned in Delaware.

The appellants claim that those portions of Title 30 of the Delaware Code are unconstitutional unless they are permitted to reduce their tax liability by a percentage computed by relating those amounts in the Delaware State budget earmarked for services not available to non-residents to the total operating budget of the State. The appellants' position was rejected by the State Tax Commissioner.

The appellants overlook the fact that what is taxed here is property not people. The imposition of the tax by the State is an act of sovereignty.

The property upon which the tax is imposed in this case is created with the permission and under the protection of the State. No further justification for the imposition of the tax is required.

There is no real contention that the tax is discriminatory as that term is used in the legal sense. No distinction is made between the property of the appellants and the property of others created within the State.

I do not find that the tax violates any State or Federal Constitutional provision.

In support of the above principles and the result reached see; *Shaffer v. Carter*, 252 U. S. 37 (1920) and *Travis v. Yale & Towne Manufacturing Company*, 252 U. S. 60 (1920).

The ruling of the State Tax Commissioner is affirmed.

It is so ordered.

APPENDIX A-3.

BEFORE THE

STATE TAX BOARD OF THE STATE OF DELAWARE

DOCKET No. 341

PAUL G., AND JANE A. STEPHAN,
Petitioners,

v.

STATE TAX COMMISSIONER,
Respondent.

ORDER

AND NOW, TO WIT this 16th day of January, 1968, the petition of the above taxpayer for redetermination of an assessment for income tax for the year 1966 having been considered by this Board upon formal hearing, it is

ORDERED, that the petition be and is hereby denied, and the assessment affirmed.

So Ordered

LEROY A. BRILL,
Leroy A. Brill, Chairman,
W. HOWARD WORKMAN,
W. Howard Workman,
State Tax Board.

1/18/68

APPENDIX A-4.

Delaware Code—Vol. 12
Title 30—State Taxes
Part II—Income, Inheritance and Estate Taxes

Chapter 11 Income Tax
Subchapter I General Provisions
Sec. 1101 Definitions

"Taxable" means—

(7) every natural person who is a nonresident of this State but only to the extent that such person received income during the taxable year:

(a) as compensation, as an employee in the conduct of the business of an employer, for personal services:

(i) rendered in this State, or

(ii) attributable to employment in this State and not required to be performed elsewhere, or

(b) to the extent that such person derived net profits from a profession, vocation, business, trade or commerce conducted in this State.

"Adjusted gross income" means the amount of taxable's net income under this chapter would be if the exemptions allowed under section 1117 of this title and the deductions allowed under section 1118 of this title were not allowed.

"Gross income" means the total income from whatever sources derived, whether within this State or elsewhere, except income excluded by section 1116 of this title.

"Nonresident apportionment ratio" means the ratio that the adjusted gross income of a nonresident bears to his gross income.

Subchapter II Computation of Tax, Exemptions and Deductions

Sec. 1111 Rates of Tax

There shall be levied, assessed, collected and paid annually by every taxable a tax on the net income of the preceding calendar year, subject to the exemptions named in this subchapter, to be computed as follows:

1½% of the amount of net income not in excess of $1,000; 2% of the amount of net income in excess of $1,000 but not in excess of $2,000; 3% of the amount of net income in excess of $2,000 but not in excess of $3,000; 4% of the amount of net income in excess of $3,000 but not in excess of $4,000; 5% of the amount of net income in excess of $4,000 but not in excess of $5,000; 6% of the amount of net income in excess of $5,000 but not in excess of $6,000; 7% of the amount of net income in excess of $6,000 but not in excess of $8,000; 8% of the amount of net income in excess of $8,000 but not in excess of $30,000; 9% of the amount in excess of $30,000 but not in excess of $50,000; 10% of the amount in excess of $50,000 but not in excess of $100,000; 11% of the amount in excess of $100,000.

Sec. 1117 Personal Exemptions and Credits for Dependents

(c) In the case of a nonresident the credits allowed by this section shall be limited to a figure ascertained by multiplying the credits provided by this section and his nonresident apportionment ratio.

Sec. 1118 Deductions

(18) In the case of a nonresident, who does not elect to use the standard deduction, as provided in paragraph (16)(A) of this section, the deductions allowed by this section, except deductions relating to the operation of a business or trade, shall be limited to a figure ascertained by multiplying such deductions and his nonresident apportionment ratio, and deductions relating to the operation of a business or trade shall be limited to such operation in this State.

Sec. 1163 Joint Returns for Husband and Wife

In the case of a husband and wife living together, the income of both may be included in a single joint return, provided that each received income includable in net income under this chapter, or provided that the gross income of both is entirely attributable to one spouse.

APPENDIX A-5.

Delaware Code—Vol. 8.
Title 14—Education.
Part I—Free Public Schools.

Chapter 1 State Board of Education

Subchapter II Powers and Duties

Sec. 122 Rules and Regulations

(b) The Board shall prescribe rules and regulations
(11) Governing the admission of pupils from the schools of one district to the schools of another district.

Chapter 6 Tuition Charges

Sec. 602 Method of Computation of Tuition Charges for Nonresident Pupils

(a) No pupil shall be transferred from one school district to another school district without the written approval of the Board of Education or Board of School Trustees of both the sending and receiving districts. A school district receiving any pupil who is a resident of another school district shall collect a tuition charge for the non-resident pupil. Such tuition charge shall be paid by the Board of Education or Board of School Trustees of the school district in which the pupil is a resident from the proceeds of a local tax which shall be levied for this specific purpose.

(e) Any school district sending pupils to the schools of another district shall levy and collect a tax to pay any tuition charges to the receiving district, and such tuition shall be collected by local taxation within the sending district according to the provisions of taxation as set forth in Chapter 19 of this title, except that no referendum shall be required.

APPENDIX A-6.

Delaware Code—Vol. 8.
Title 14—Education.
Part II—University of Delaware.

Chapter 34 Higher Education Scholarships

Sec. 3401 Purpose

It is the intent and purpose of the General Assembly of the State through this chapter, to encourage qualified Delaware students to pursue courses of higher education when such courses are unavailable in State supported institutions and when such pursuit is deemed in the best interest of the State.

Sec. 3404 Grants

(a) The Board is hereby authorized to award scholarships from the Scholarship Fund to Delaware students pursuing courses of higher education, subject to the rules and regulations adopted by the Board and the limitations set forth in this chapter.

(b) The Board shall adopt such rules and regulations as it deems necessary and proper for the purpose of administering this chapter and determining the award of scholarships, subject to the following limitations:

(1) No student shall be eligible for such scholarship who was not a resident of the State for at least one year immediately prior to approval of the award. Residency status of a student under 21 years of age shall be determined by the legal residence of his parent or a court-appointed guardian who must have qualified as a registered voter in Delaware and who is subject to payment of Delaware income taxes. In the case of a student over 21 years of age, he must have qualified as a registered voter in Delaware and must be subject to the payment of Delaware income taxes.

APPENDIX A-7.

Bulletin of the University of Delaware
Volume 65, Number 6

General Information

Regular Fees and Expenses, (p. 52)

Funds for the operation of the University come from five principal sources: State appropriations; student fees; Federal appropriations, grants and contracts; gifts and benefactions of alumni and friends; and endowment income. Student fees, including room and board charges, amount to approximately 34 percent of the total operating budget of the University.

University fees and charges to students are given below.

University Fixed Charges, (p. 53)

	Residents of Delaware		*Nonresidents of Delaware*	
	Semester	*Academic Yr.*	*Semester*	*Academic Yr.*
General Fee and Nonresident Tuition ...	$175	$ 350	$472.50	$ 945
Room and Board	425	850	450.00	900
Total Including Room and Board	600	1,200	922.50	1,845

Qualifications as a Delaware Resident, (p. 54).

In general, a student who is economically dependent upon his parents (or legal guardian) is eligible for classification as a resident of Delaware if his parents (or legal guardian) have maintained continuous residence in Delaware for twelve months immediately preceding the begin-

ning of the semester or session. Upon request, this classification will be reviewed each semester or session if there is a change in the resident's status.

A student's residence classification will be determined by his own legal residence if he is emancipated from his parents or legal guardian (generally determined by status as a dependent for income tax purposes). In this instance, continuous residence in Delaware for twelve months immediately preceding the beginning of the first semester or session at the University of Delaware is required in order to be classified as a Delaware resident. An economically independent student who is classified as a nonresident at the time of his original enrollment may not subsequently qualify as a Delaware resident as long as he remains a full-time student.

Delaware resident classification will be terminated at the beginning of the semester or session next following a move from the State of Delaware. However, upon receipt of evidence of the time required to qualify for resident tuition rates at state-supported colleges and universities where the student then resides, Delaware resident rates will continue to be charged for up to one year, until eligibility for in-state tuition rates has been established in the new state of residence.

All of the ramifications of residence status, obviously, cannot be included in the catalog. If there is any question concerning residence status, especially if it is complicated by unusual situations (such as divorce, custody, or guardianship arrangements), the implications should be clarified with the University Cashier, telephone 738-2127, prior to registration.

Failure to give complete and correct information to the University regarding residence constitutes grounds for dismissal.

Credit Hour Fee, (p. 55)

Delaware residents, who enroll for less than twelve hours, pay a fee of $15 per credit hour in lieu of the general fee. Out-of-state students, who enroll for less than twelve hours, pay $40 per credit hour in lieu of the general fee and out-of-state tuition. For this purpose, courses being taken without credit are included in the credit hour total. Students carrying less than twelve hours are not eligible to participate in extra-curricular activities supported by the general fee. Those who wish to do so may purchase tickets to athletic events and plays and may pay a fee of $9 per semester for treatment at the Student Health Service.

Associate Degree Programs, (p. 199)

The University of Delaware offers associate degrees of two general types:

1. The Associate in Science (AS) or the Associate in Arts (AA) is awarded to the student who completes satisfactorily the first two years of an academic program leading to a baccalaureate degree. These degrees are awarded in recognition of the completion of academic work normally offered by the community or junior college, and are not terminal in nature. Most of the academic majors offered in the Undergraduate Division are available through the Division of University Extension. A detailed brochure on this program is available from the University Extension Office.

2. The Associate in Applied Science (AAS) is awarded to the student who completes the requirements of one of the special two-year terminal programs. Not all of the courses in these programs are of collegiate character, and not all are acceptable for baccalaureate credit if the student later decides to pursue a four-year degree program. This

degree is available only to residents of the State of Delaware. Courses required in these programs are not offered in the evening classes of the Division of University Extension.

APPENDIX A-8.

Delaware Code—Vol. 12

Title 31 Welfare

Part I Department of Public Welfare

Chapter 3 Child Welfare

Subchapter 1 General Provisions

Sec. 307

(a) No person or corporation of this State or any child placement agency, or association operating within this State, and supported in whole or in part by public funds, or any bureau, board or commission of this State, or any person, institution, agency, association, corporation, bureau, board or commission without this State shall bring or send into this State, or in any way assist in the bringing or sending into this State of any dependent child who is a resident of another state for the purpose of placing or procuring placement of such child in any free, wage or boarding home, or any child for the purpose of adoption without the written consent of the Department having first been obtained; and such person, agency, institution, association, corporation, board or commission shall abide by all rules laid down by the Department.

Chapter 5 State Public Assistance Code

Sec. 504 Categories of Assistance

Assistance shall be administered under the following categories—

(1) Old Age Assistance; assistance granted to needy persons who are 65 years of age or over, and who

have resided in Delaware for a period of one year immediately preceding application.

(2) Aid and Services to Needy Families with Children; assistance granted with respect to needy families with children. Aid and Services to Needy Families with Children means aid granted with respect to a child under the age of eighteen who has been deprived of parental support or care by reason of the death, continued absence from the home, physical or mental incapacity or the unemployment (as defined by the Department) of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew or niece, in a place of residence maintained by one or more of such relatives as his or their home. A child shall be eligible for aid who has resided in the State for one year immediately preceding the application, or who was born within one year immediately preceding the application, if the parent or relative with whom the child is living has resided in the State for one year immediately preceding the birth, or, if the parent, parents or relative with whom the child is living has been a resident of the State for one year immediately preceding the application. Aid and Services to Needy Families with Children may include aid granted to any one of the relatives enumerated above with whom the child is living if that person is in need, such relative to be designated as the caretaker relative for the purposes of this chapter, and to the spouse of such relative if such relative is the child's parent provided said spouse is living in the home, is incapacitated or unemployed within the meaning of this section and is in need.

If found feasible by, and in accordance with regulations prescribed by the Department, the term "Aid

and Services to Needy Families with Children'' shall also include aid granted with respect to children who, while receiving such aid are removed from their home and placed in foster family homes (or during the period commencing on October 1, 1962, and ending on September 30, 1964, are placed in public or private child care institutions) as the result of a judicial determination, initiated during the month in or for which such children were receiving such aid, that continuation in the parent's or relative's home would be contrary to the child's welfare.

(3) Aid to the Disabled; assistance granted to needy persons who are permanently and totally disabled, as defined by the Department, who have attained the age of eighteen, and who have resided in Delaware for a period of one year immediately preceding application.

(4) General Assistance; assistance granted to all other needy persons who have resided in Delaware for a period of one year immediately preceding application.

(5) [See, also, subsec. (5), set out below] Medical Assistance for the Aged; assistance granted in the form of Medical Care as defined in section 502 of this title, to persons 65 years of age or over who are medically needy, as defined by the Department, who are residing in Delaware (without regard to the length of residence in the State) or who are residents of Delaware but absent therefrom.

(5) [See, also, subsec. (5), set out above] Medical Care; assistance granted in the form of Medical Care to persons residing in this State including residents absent therefrom who—

(a) are recipients of assistance in any of the categories listed in subsections (1), (2) and (3) of this section or as aid to the needy blind or who would be eligible for any such assistance in one of such categories except that they do not meet the durational residence requirement prescribed therefor, or

(b) are eligible for Medical Assistance for the Medically Indigent.

Sec. 506 Temporary Assistance to Non-residents

Any person in need of public assistance while physically present in Delaware, but who lacks residence in this State as defined in this chapter, may be granted assistance subject to the immediate initiation, pursuant to rules and regulations of the Department, of all lawful steps to determine residence elsewhere. Assistance to any such person shall be terminated when any one of the following events first occurs:

(1) he moved to some other jurisdiction;

(2) he receives public assistance of any kind from some other jurisdiction;

(3) he ceases to be a needy person; or

(4) he is found to have residence elsewhere.

Part II Other Welfare Agencies

Chapter 21 Delaware Commission for the Blind

Sec. 2108 Eligibility and Applications for Instruction

Any adult blind person who is a resident of the State may make application to the Commission to receive instruction and training from the instructors. (and etc.)

Chapter 23 Aid to the Blind

Sec. 2303 Eligibility of the Needy Blind for Assistance

Assistance shall be granted under this chapter to any blind person who—

(6) Has been a resident of this State since the time he lost his sight, or has been a resident of this State for one year immediately preceding the date of application. Residence requirements may be waived or altered by cooperative agreements with other states in order to facilitate mutual transfer of recipients moving between Delaware and the cooperating state.